

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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THE UNITED STATES OF AMERICA,  
*Appellant,*  
vs.

OTIS E. MILES, E. M. LA CASA, JOHN  
NELSON, T. M. THOMPSON, MAN-  
UEL FERNANDEZ, J. RODRIGUES,  
A. F. AWORT, MARK KOBZ, R.  
REDD, G. H. MARSH, C. CARLSON,  
T. NILSEN, JAMES McLENNAN,  
EVERT SEPPA, FRED TAUCHER,  
JOHN ANDERSON, J. W. JAKOBS-  
SEN, E. C. HANSEN, J. B. NORMAN,  
K. K. POLLARD and O. LUND,  
*Appellees.*

## BRIEF OF APPELLANT

UNITED STATES OF AMERICA

UPON APPEAL FROM THE SOUTHERN  
DIVISION OF THE UNITED STATES DIS-  
TRICT COURT FOR THE NORTHERN DIS-  
TRICT OF CALIFORNIA, FIRST DIVISION  
IN ADMIRALTY.

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*Appellees.***BRIEF OF APPELLANT, UNITED STATES OF AMERICA**

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**STATEMENT OF THE CASE.**

Twenty-one members of the crew of the Steam-  
 ship "West Inskip," consisting of three oilers, six

firemen, one deck engineer, one carpenter, nine sailors and one ordinary seaman, who had shipped on that vessel in November, 1919, on a voyage from the Pacific Coast to Asiatic ports and return, sued the United States on May 11, 1920, in the Southern Division of the United States District Court for the Northern District of California, First Division in Admiralty, for salvage services alleged to have been rendered to the S. S. "Deuel" about December 14, 1919, near the Port of Yokohama, Japan, where the "Deuel" had run aground. Both of the vessels were owned by the United States. (Tr., pp. 5-9.)

Neither the master nor any of the officers of the "West Inskip," and only a portion of her crew, are named as libelants in the suit.

At the time of the alleged salvage services the "Deuel" had a value of about One Million, Seven Hundred and Sixty-two Thousand Dollars (Tr., p. 24). Repairs to the "Deuel," consequent upon her grounding, cost about Sixty Thousand Dollars (Tr. p. 19).

The cargo aboard the "Deuel" at the time she grounded had a value of about One Million Five Hundred Thousand Dollars. All of this cargo was privately owned, and nothing has been collected by the United States for its salvage. (Tr. pp. 17-19.) An attempt, however, to adjust the amount that the "Deuel" should pay to the "West Inskip" has been made by the Insurance Division of the United States Shipping Board Emergency Fleet Corporation by

a tentative agreement to settle the claims of the "West Inskip" and her crew for Forty-five Thousand Dollars, of which Forty Thousand was to be applied to the services of the "West Inskip" and Five Thousand to be apportioned to her crew. The leading cargo underwriters agreed to those amounts. (Tr. p. 19.) The United States alleged in its answer that an offer of settlement had been made to the libelants on the basis of Five Thousand Dollars to be apportioned among the members of the crew of the "West Inskip" as follows: Six Hundred Dollars to the Master of that vessel, Fifty Dollars extra to the members of her crew who boarded the "Deuel" and assisted in jettison work, and the balance of the Five Thousand Dollars to be apportioned according to the wages earned by the members of the crew. (Tr. p. 15.)

The District Judge awarded each of the libelants an amount equal to two months pay, or a total of Three Thousand Seven Hundred and Fifty Dollars. (Tr. p. 26.) The total monthly pay-roll of the "West Inskip," including the salaries of her master and officers, was Five Thousand Three Hundred and Seventy Dollars (Tr. p. 25), and consequently had the libel in this case been instituted by all of the officers and crew of the "West Inskip" instead of but by 21 of them, the total award, if made on the same basis, would have been in the neighborhood of Ten Thousand Seven Hundred and Forty Dollars. It is submitted that the award made, in view of the

services rendered as disclosed by the record, is excessive.

The S. S. "Deuel," laden with a general cargo, sailed from the Port of Seattle, Washington, bound to the Port of Dairen, on November 17, 1919. After a stormy passage of 24 days her compass was found to be defective, and due to this fact, and to the fact that upon the vessel swinging around Najuma Saki at 4:30 a. m., on December 14, 1919, the current was flowing in a direction opposite to that shown on the charts, the vessel at about 9:09 a. m. on December 14, 1919, grounded at Kamigo reef, at the entrance of the Gulf of Tokio. Immediately after the grounding the "West Inskip," then leaving Yokohama bound for Kobe, picked up a wireless message from the "Deuel" and came alongside the "Deuel" and offered assistance. (Tr. pp. 48, 53.) At high tide on December 14, 1919, the "West Inskip," with the help of the engines of the "Deuel," endeavored to pull the "Deuel" off, and after continuing the endeavor for *one hour* without any success, pulling ceased for the night. (Tr. p. 53.) At high tide on December 15, 1919, either from 10:00 a. m. to 10:45 a. m. (Tr. p. 53), or from 8:30 a. m. to 10:50 a. m. (Tr. p. 42), but probably commencing at about the first mentioned time (Tr. p. 52), another united effort was made to re-float the "Deuel," which was also unsuccessful. (Tr. pp. 42-53.)

A surveyor of the American Bureau of Shipping, who had gone aboard the "Deuel" at 8 a. m. on De-

ember 15, 1919, directed on that day the shifting of part of the deck cargo of square logs, and the throwing overboard of part of this cargo. This work was accomplished by the crew of the "Deuel" assisted by seven members of the crew of the "West Inskip" (Tr. pp. 25, 43), and continued until about 10:30 p. m. that day.

The following morning, December 15, 1919, the work of jettisoning the deck cargo was continued, with the additional assistance of forty stevedores who had been brought from Yokohama (Tr. pp. 43-45).

After the "Deuel" had thus been lightened under the direction of the surveyor, another effort was made to float her by the "West Inskip," aided by the engines of the "Deuel." This effort commenced at 10:30 a. m., December 16, 1919, and at 11:20 a. m., a little less than an hour later (Tr. p. 45), or at the most in about two hours (Tr. p. 53), the "Deuel" slid off ground. This apparently completed the salvage service of the "West Inskip." Most of the time after she first appeared on the scene, some time during the afternoon of December 14, 1919, she had been merely standing by. *The time she was actually engaged on pulling on the "Deuel" was less than five and a half hours.* The "West Inskip" altered her course to go to the assistance of the "Deuel" at 2:45 p. m., December 14, 1919 (Tr. p. 51), and she performed no service whatever, so far as the record shows, after 11:20 a. m. on December 16, 1919. Ac-

ording to the report of the Surveyor who directed the salvage operations (Tr. p. 46), the bottom where the "Deuel" stranded was rocky and uneven, and much broken up all around, and the nearest land was about one and one-fourth miles off. The position he said was fraught with danger, because a westerly wind, the prevailing wind at that season, would have materially lessened the "Deuel's" chances. Moderate and fine weather, however, prevailed at the time. The Surveyor also expressed the view that the refloating of the "Deuel" in such quick time was mainly due to the masterly way in which Captain Tibbetts, of the "West Inskip," placed his ship in position, and then rendered very efficient service. His modesty, perhaps, prevented any reference in his report to his own efforts in ordering and directing the shifting and jettisoning of the deck cargo, and his other efforts during December 15th and 16th, 1919, which undoubtedly contributed, to a very great extent, to getting the "Deuel" into deep water again, and for which services he contented himself with the moderate fee of 600 yen (Tr. p. 46).

For the salvaging of the privately owned cargo the libelants of course have no claim against the United States. So far as the salving of the "Deuel" is concerned, it is true that that vessel was in some danger, or would have been, had an unfavorable wind arisen. It does not appear that the "West Inskip" was in any danger at any time, nor was any



member of her crew called upon to risk, in the slightest degree, either life or limb, or to perform any more hazardous thing than he would ordinarily be called upon to do in a day's work. No member of the crew of the "West Inskip," so far as we know, was called upon to perform any additional service during the time that vessel was going to the "Deuel's" assistance, or while the "West Inskip" was standing by, which was about forty hours out of approximately forty-six hours during which the "West Inskip" was delayed on account of the salvage service. There is nothing to show that any difficulty was encountered in passing the lines between the two vessels. The hardest work performed by any of the crew of the "West Inskip" was that of her seven members who assisted during the afternoon and evening of December 15, 1921, in shifting and jettisoning a portion of the deck cargo of the "Deuel," and it does not appear that there was any risk attached to this labor.

An award of a full two months pay to each of the libelants under the circumstances seems clearly excessive.

#### SPECIFICATION OF ERRORS RELIED ON BY THE APPELLANT.

1. The Court erred in awarding to the libelants, or to any of them, any amount whatsoever for alleged salvage services rendered to the S. S. "Deuel."
2. The Court erred in awarding to the libelants, and to each of them, two months pay for salvage

services alleged to have been rendered by them to the S. S. "Deuel" and in awarding to said libelants, and to each of them, any amount in excess of one month's pay to each of them as compensation for said alleged salvage services.

3. The Court erred in failing to render a decision and order judgment entered in favor of the said appellant, the United States of America, dismissing the libel of said libelants filed in said cause.

4. The Court erred in awarding to the said libelants, and to each of them, any amount whatsoever, for the reason that said libelants were at the time of the alleged salvage services members of the crew of a vessel belonging to the United States of America, and rendered salvage services, if any, to a vessel likewise belonging to the said United States of America, and by reason thereof it became the duty of the said libelants, and each of them, to render said services without compensation beyond their wages as seamen on said United States vessel.

#### BRIEF OF THE ARGUMENT.

Considering the nature of the salvage service rendered in this case, an award to those of the members of the crew of the "West Inskip" who are libelants in the suit equivalent to \$10,740.00, if all the officers and members of the crew had been parties, is excessive. The crew of the "West Inskip" were never in any danger, and except seven of them, who assisted in shifting the cargo of the "Deuel," they

were not called upon to perform any unusual labor. The salving vessel was pulling on the "Deuel" less than five and one-half hours. The remainder of the time, about 40 hours, the "West Inskip" was merely standing by. So far as the United States is concerned, the only property at risk was the "Deuel," having a value of \$1,762,000.00. The "Deuel's" cargo was privately owned, and no award for the salvage of it can be made in this case.

A comparison of the award in this case with that in *The Kia Ora*, 246 Fed. 143, which so far as we can ascertain is the largest award on record in any case of stranding, will be of interest. The "Kia Ora," on a voyage from Australia to London, while going full speed grounded on a coral reef in the Bahamas in February. She was rescued by the wrecking steamer "Relief" with a crew of 70 men, which came from Kingston, 360 miles distant. The "Relief," which had been specially built and equipped for salvage work at a cost of \$450,000.00, in response to wireless calls for assistance, reached the "Kia Ora" in 21½ days and carried on salvage work for five days thereafter. During the progress of the work it became necessary to jettison cargo of the "Kia Ora" to the value of \$428,000.00. The salvage work was successful, and the "Relief" was the only vessel available that could have rendered the service. The libellant, in addition to specially building and equipping the "Relief," maintained a plant at Kingston at an annual cost of \$36,000.00, especially for wrecking purposes. It was conceded

in the case that the "Relief" worked hard, under great difficulties, having strong winds and current, and a very nasty swell to contend with, and the "Kia Ora" was in great danger at the time from gales to be anticipated at that season of the year. The Court held that the services were of a peculiar and highly meritorious character, and in making an award for the whole service of \$100,000.00, the Court took into consideration the fact that the salvors were experienced, that no other assistance was available, that the "Kia Oro" was in a dangerous condition, and that the work was performed under bad weather conditions, and said that practically every element calling for reasonable salvage existed. The values at risk were the largest in any reported case, being \$4,000,000.00 as found by the Court, and \$5,500,000.00 as claimed by the respondent. The award made figured  $2\frac{1}{2}\%$  of the value as found by the Court, or  $2\%$  of the value claimed by the respondents. In other words the value at risk, and concerning which the libelants were entitled to claim salvage, amounted to approximately  $2\frac{1}{2}$  times that involved in the present case, and there exists in the present case scarcely any of the elements that are found in the "Kia Ora" case that go to make up a meritorious salvage case of a high order. The award in the "Kia Ora" case, however, is much less in proportion, notwithstanding the hazardous nature of the undertaking, than the award now under discussion.

In *The Noelle*, 263 Fed. 590, a total award of only \$35,000.00 was made, in a case where the peril, both

to the vessels involved and to their crew, was infinitely greater than the peril shown to exist in this case. The S. S. "Noelle," worth with her cargo and freight \$1,625,000.00, stranded nine miles off Hatteras, a well-known dangerous locality. The salving vessel was the only one available, and in performing the services expended \$3,000.00 and lost two days' time. She had been especially equipped for that kind of work, and was worth \$175,000.00. The stranding occurred at a particularly dangerous place known to the maritime world as the "Graveyard of the Atlantic," where even slightly increased weather conditions would in all probability have resulted in the total loss of the "Noelle." The salving vessel performed the service entirely unaided, either by other vessels or by the lightening of the vessel in distress.

The two cases just cited are instances where large awards have been made because of the particularly hazardous conditions existing, but in *The Tordenskjold*, 255 Fed. 672, where the conditions more nearly approached those which existed in the present case, a much reduced award was made by the appellate court. The 'Tordenskjold grounded some 14 miles south of Hilsborough Light, on the Florida coast, and there could be no question, the Court said, that any ship ashore on the Florida reefs, exposed as that one was to the full force of the sea, was in great peril. The "Tordenskjold," which had a value of about \$1,000,000.00, was salvaged by a tug of the value of \$85,000.00. The weather was fine during the

salvage operations, but the position of the disabled vessel was one of extreme danger. There were no elements of heroism or danger to life involved. The District Court made a total award in the case of \$40,000.00, but on appeal the Circuit Court of Appeals awarded the sum of \$10,000.00 to the rescuing vessel, saying *that the award of the District Judge indicated that undue weight was attached to the value of the property saved, and that there was a lack of due consideration of the absence of such attending circumstances as would justify the liberality evidenced by the decree.* The sum of \$10,000.00 included, of course, compensation to the rescuing vessel as well as to her officers and crew.

Another case somewhat similar to the case at bar, but where the danger, perhaps, to the disabled vessel was not as great, is that of *Jacobson et al. vs. Panama R. Co.*, 266 Fed. 344, where the S. S. "Panama" stranded on a reef 50 miles west of Port au Prince, about 10 miles from the Island of Haiti. She was salvaged by the S. S. "Neptunas," but as in the case of the "Deuel," the disabled vessel was lightened mainly by stevedores before the salvage service was completed. The District Judge made an award of \$2,000.00 for the salvage service, but this on appeal was reduced to one-fourth of the amount.

The conditions surrounding the salving of the "Teresa Accama," (254 Fed. 637) were very similar to those that existed in connection with the salving

of the "Deuel" by the "West Inskip." The "Teresa Accama" grounded off False Cape, some two miles northeast of the life-saving station, and about 20 miles south of Cape Henry. Her value, including cargo, was about \$2,000,000.00. She was salvaged by the "Rescue," a large wrecking vessel worth with her outfit about \$250,000.00. The salvage operations were conducted in good order, and no special danger was incurred by the salvors. The work was intelligently and expeditiously performed. The "Teresa Accama" was in considerable danger, having regard to the character of the coast, the depth of the water, and the nearness of the vessel to shore, especially in case of a change of wind to eastward, and having regard also to the other weather conditions reasonably to be anticipated at the time. The Court awarded for the whole service, including towing the "Teresa Accama" to a safe place after she had been pulled off, the sum of \$12,000.00, which included the claim of the owner of the "Rescue" as well as her officers and crew. *In the present case had an award on the same basis been made to the members of the crew of the "West Inskip," it would have amounted to about one-half month's pay to each of them.*

In *The Flottbek*, 118 Fed. 954, where a sailing ship lay for two days and nights within a few hundred feet of rocks along the Coast during stormy weather and heavy seas, being held only by her anchors, and was rescued at considerable peril owing to the heavy seas, the salvaged vessel being in great peril,

the Circuit Court of Appeals reduced awards to the officers and crew of the rescuing vessel amounting to \$3830.00, and to the captain, officers and crew of three tugs amounting to \$5,000.00, and said that the appellate courts are the final arbiters, and it is their duty to decide the questions fearlessly and impartially, with an eye single to reach the ends of justice.

In *The Apalachee*, 266 Fed. 923, the weather conditions were much worse and the danger greater than in the case now before this court. There steam tugs aided in pulling off the "Apalachee" worth \$450,000.00, from a sand bar where she had stranded. It was doubtful whether the final result was not attained by the "Apalachee" alone. The Court in this case awarded \$10,000.00 for salvage in addition to the damages sustained by the tugs, and of this amount set apart 80% to the owners of the rescuing vessels and 20% to the crews, apportioned according to their wages.

Another case where the circumstances are very similar to those involved in the rescuing of the "Deuel" by the "West Inskip" is that of *The Professor Koch*, 260 Fed. 969. In that case a barque had stranded on a ledge during fair weather. There was no immediate danger to the vessel, but it was in a bad position, exposed to the full force of the sea if a storm had arisen. The barque was pulled off by tugs, and finally placed in a safe condition,



the work consuming about 200 hours. The commercial value of these services was about \$2,300.00. The work was done in moderate weather, within 15 miles of the home port of the salvor. Considerable skill was used, and the work done "exactly" from start to finish. The Court held under these circumstances that the libelants were entitled to the market value of the services plus a fair reward for the risk to them, which was little, for the promptness, for the skill displayed, and for the success, and fixed \$10,000.00, which was about four times the commercial value of the services, as a reasonable amount. No order was made in this case as to what proportion should go to the crew and what proportion to the owners.

It will be noted from the cases cited that except in extraordinary cases where either the property of the salving vessel is at great risk, or the members of her crew are in considerable danger and perform hazardous labor, the policy of the courts, particularly as indicated by the recent cases, is not to make large awards for trifling services merely because the values salvaged are large, but the tendency is, and rightfully so, to compensate both the owner of the rescuing vessel and her officers and crew, on the basis of the actual services performed by them, with the addition of a reasonable amount for the purpose of encouraging the undertaking, whenever necessary, of salvage work. As stated in *The Gambetta*, 74 Fed. 259, the exact value of the property

saved, when large, is a minor element in computing salvage, and as it increases the rate per cent given is rapidly reduced. It is compensation for actual service rendered, and a reasonable gratuity for the benefit of commerce that is contemplated, and not a fixed percentage of the property saved. In *The Wellington*, 52 Fed. 605, the Court said that when the value of the salvaged ship is small the salvors are entitled to a larger per cent than where it is large, and where the value of the salving vessel, and therefore the owner's risk, is large, the award should be greater, and the ratio of the owner's share to that of the master and crew should be larger, than where the value of the salving vessel is small.

Counsel for the respondent in the case of *The Kia Ora*, 246 Fed. 143, insisted that in fixing a salvage allowance the Court should not undertake to base the same upon a percentage of the value saved, because such a method is antiquated, and should no longer be followed, and the Court in that case concurred in that view to the extent of saying that it was not the proper, and certainly not the practical rule of arriving at a fair and just compensation where the values are large. The reason for this is apparent. In the olden days, when vessels were comparatively small and inexpensive, the owner had little at risk compared to the owners of the huge steamships of these later days, and consequently the proportionate share formerly awarded to the crews was infinitely larger than can or should be

allowed under present conditions. The manner, too, in which modern steamships are operated, whether on their ordinary voyages or when engaged in salvage services is vastly different from the old conditions, and where formerly every member of the crew in all probability took an active part in the salvage services and exposes himself to considerable personal risk, we find now that the great majority of the crew, as was the case in the present instance, are not active in the salving service at all, and perform no work or labor beyond that which they are ordinarily called upon to perform in a day's work.

To award to members of a crew who take no active part in salvage work, large compensation based mainly not upon service but upon values at risk, would be to impose an unreasonable burden upon merchant shipping, and unless there is something out of the ordinary about the salvage service rendered, or some element of personal risk, or some unusual labor performed, there is no good reason why the members of a crew of a steamship should be awarded anything more than compensation for the actual service rendered, and that reasonable gratuity that the cases speak of for the benefit of commerce in general, and it is respectfully urged that this court apply these principles in the case now before it. A careful examination of the facts in this case will show that there was nothing extraordinary or hazardous about the services rendered

to the "Deuel" by the "West Inskip" and nothing that would call for an award equivalent to over \$10,000.00 for the benefit of the officers and members of the crew alone.

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